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(2)

No. 09-407

In The

Supreme Court of the United States

ANA M. ABREU-VELEZ, M.D., PH.D.,

Petitioner,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, THAT CREATED AND OPERATES THE MEDICAL COLLEGE OF GEORGIA; THE MEDICAL COLLEGE OF GEORGIA; AND DENNIS MARCUS, M.D., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY UNDER COLOR OF LAW AS FORMER VICE CHAIRMAN OF DEPARTMENT OF OPHTHALMOLOGY OF THE MEDICAL COLLEGE OF GEORGIA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR REHEARING

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I. INTRODUCTION

Petitioner Ana M. Abreu-Velez, M.D., Ph.D. ("Dr. Abreu"), pursuant to Rule 44(2), hereby files her Petition for Rehearing of the Court's Order Denying Petition for Writ of Certiorari entered on November 16, 2009. Dr. Abreu asserts that this Petition for Rehearing is based on substantial grounds not previously presented.

II. SUBSTANTIAL GROUNDS FOR REHEARING

In her initial Petition, Dr. Abreu set forth the facts which supported her First Amendment claim which meet the 5-prong test established in *Pickering v. Board of Education,* 391 U.S. 563 (1968), and expanded by *Garcetti v. Ceballos,* 547 U.S. 410 (2006). Dr. Abreu asserts that, as an additional argument, the Court should consider that Dr. Abreu's speech should be found to be protected speech based on the obvious conclusion that her interest in her speech outweighed the interests of the public employer, the Medical College of Georgia ("MCG"), in promoting the efficiency of the public services being performed. Any speech by Dr. Abreu concerning practices in clinical trials at MCG is a matter of public concern. This would be true even if Dr. Abreu were found to be incorrect in her speech. *Tuttle v. Johnson Controls Battery Div.*, 2004-SOX-76 (ALJ January 3, 2005). If a complainant can show that she believed that there are wrongful practices in the workplace, then even

though an objectively reasonable person might well not reach such a conclusion, the complainant's disclosure is still a protected speech.

III. ARGUMENT

Dr. Abreu believed that Dr. Dennis Marcus was engaging in serious research misconduct and terrible wrongdoings in clinical trials, the scope of which alarmed her. Dr. Abreu had been hired as clinical trials coordinator for the Department of Ophthalmology at MCG to work specifically with Dr. Marcus on the clinical trials being performed by him and his staff. Her job duties included preparation of forms; contact with medical staff and patients; tracking and reporting budget figures; and data entry and organization of the files related to the clinical trials. Unlike the district attorney in *Garcetti* who claimed he had been passed up for a promotion because he had criticized the legitimacy of a warrant and where his job duties clearly included discussion of the appropriateness of such warrants, Dr. Abreu's job duties included no auditing or direct compliance issues. In other words, she had responsibility to keep records in such a way as to comply with the various regulations involved in the clinical trials; she did not have the responsibility or the authority to demand that certain practices be revised or stopped. Indeed, that responsibility belonged to Dr. Marcus as the Principal Investigator ("PI") on each clinical trial or to the Director of the Department, Dr. Nussbaum.

Dr. Abreu has demonstrated:

1. That she exercised her right to free speech (and whistle blowing) when she reported to the Department's Administrator and Director the fact that Dr. Marcus had not taken steps to correct what she believed to be serious research misconduct;

2. That her speech addressed a matter of public concern, to-wit: it involved patients and clinical trials conducted in a teaching hospital (trials which would be relied on by the public or pharmaceutical companies which sponsor the trials);

3. That her speech outweighed MCG's interests in promoting the efficiency of the public services being performed [Dr. Abreu was disclosing the fact that the clinical trials were severely flawed and, in the case of one study, 12 out of 12 patients died after suffering a severe adverse event ("SAE").];

4. That she has shown that the evidence presented in the District Court below did not support summary judgment as to whether her speech was a substantial motivating factor in the termination of her employment (The evidence, in fact, dictated that it is a jury question.); and

5. That she has shown that there was no credible evidence presented in the District Court to support a finding by the preponderance of the evidence that MCG would

> have terminated her employment in the absence of her protected speech.

Pickering, supra; Garcetti, supra.

In her initial Petition, Dr. Abreu sought a decision by this Court establishing definitive and comprehensive standards by which a public employee's speech may be examined so that the public employer, like MCG, cannot hide behind the cloak of an assertion that the speech was part of that employee's official job duties. Dr. Abreu argued that, when determining whether the employee's speech was on a matter of public concern, such speech must be examined as to the content, form and context. *Jones v. Board of Regents of the University System of Georgia*, 262 Ga. App. 75, 585 S.E.2d 139 (2003), citing *Pickering, supra.* Dr. Abreu had nothing to gain by speaking out to the chain of command concerning the misconduct she found in Dr. Marcus' clinical trials. She did so precisely because this is a matter of public concern.

Dr. Abreu is requesting reconsideration of the Order dated November 16, 2009, she and her family having experienced almost six years of tremendous physical and emotional suffering and professional and economic losses. Dr. Abreu has lost all of her savings, her retirement funds and still owes her best friend about $45,000 he had loaned her in order to get justice.

In the District Court, Dr. Abreu believes she has observed tremendous corruption and lack of

declaration of multiple conflicts of interest by "a new, out-of-the-blue" appointed judge to her case, Judge Randall Hall, who she believes showed tremendous favoritism to MCG and who she believes had un-declared conflicts of interest such as:

(1) Judge Hall failed to enforce FOIA Request number: 1066979-000 that Dr. Abreu made to several personnel at MCG (after being advised by the FBI to request it);

(2) Judge Hall failed to order that a witness, Mr. Allan Vigil, Chairman of the Board of Regents ("BOR"), be deposed;

(3) Judge Hall failed to grant the request in discovery that the clinical histories and the clinical trials folders of the 12 patients who died in just one clinical trial conducted by Dr. Marcus be produced;

(4) Judge Hall made it almost impossible for her former attorney, Mr. Dick Hubert, to be admitted in the District Court in Augusta. (Mr. Hubert's firm was unable to continue to represent Dr. Abreu in the 11th Circuit Court of Appeals and in the Supreme Court because Dr. Abreu no longer had funds to pay for their representation, even based on this bad economy since the firm took the case in the lower court at reduced fee rates.);

(5) Judge Hall failed to report several conflicts of interest in favor of MCG such as the fact that his reception to celebrate his new appointment as judge was held at MCG and that he lobbied for MCG

Health, Inc. for $8 million with Dr. Rhan, MCG's President, when Judge Hall was senator for Augusta;

(6) Judge Hall had a very close friendship with the former President of MCG, Dr. Rhan, and served on the same committees of the Georgia governor in higher education and also as president (Judge Hall) representing the hospitals in Georgia (with Dr. Rhan as vice-president and Mr. Snell as president of MCG HI);[1]

(7) Judge Hall failed to declare that his former law firm where he worked as an attorney was consulted by Dr. Abreu and was told that the firm could not take her case because that firm had conflicts of interest with MCG;

(8) Judge Hall showed bias in favor of MCG when he completely ignored the strong evidence showing that MCG forged documents in discovery when Dr. Abreu showed the originals versus those produced in discovery by MCG. Examples include the forged reporting of the Severe Adverse Events (SAE) that should be filed in 24 hours after occurring (MCG

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[1] MCG Health System is composed of three separate, yet affiliated, organizations – MCG Health, Inc. and the clinical services offered by the faculty of the MCG and the members of the Physicians Practice Group (PPG), the former MCG Foundation and the MCG Research Incorporated (MCG RI). MCG Health, Inc. is a not-for-profit corporation formed to support the research and education mission of MCG, the State of Georgia and the Southeast by providing an environment for delivering the highest level of education and health care.

showed SAE's which occurred in 2002, or 2003 on the new forms created in 2004, 2005, 2006 and 2007.) MCG also forged the pages of conflicts of interest where Dr. Marcus received what Dr. Abreu believed to be multiple illegal payments from multiple pharmaceutical companies, copies of which were produced by Dr. Abreu;

(9) Judge Hall showed bias in favor of MCG when he omitted the evidence of a tape recorded by Dr. Abreu where Miss Debra Grupp, former assistant for the dean of the School of Medicine, Dr. David Stern, stated to Dr. Abreu that MCG was never going to rehire Dr. Abreu (Dr. Abreu applied to 130 positions at MCG, and she was not rehired for any of them as retaliation for her whistleblower activities.); and

(10) The lower court ignored the fact that Dr. Marcus had three (3) previous lawsuits against him related to his improper medical practice.

Dr. Abreu believes the 11th Circuit Court of Appeals was likely influenced by the politicians in the State of Georgia, including Thurber Baker, and believes that basically the Court of Appeals failed even to read the files. In Dr. Abreu's appeal to the 11th Circuit, the three (3) judges were anonymous to Dr. Abreu until after the decision was entered. Dr. Abreu's request that her case be heard *en banc* was denied, oral arguments were denied, and her case was recommended to be unpublished. Further, Dr. Abreu believes the 11th Circuit Court of Appeals

omitted declaring a huge conflict of interest (MCG's main attorney, Ms. Alana Kyriakakis, has a very close friendship with the Georgia Attorney General, Thurber Baker, and worked for him for many years.)

Dr. Abreu avers that this case is about employment laws, criminal laws, whistleblower protections, retaliation activities, intellectual property, lack of following state laws and specific violations of federal regulations in 45 C.F.R. 46.103 and 21 C.F.R. 56, and free speech, among other issues. Judge Hall declined to rule on the state whistleblower claim. Neither the 11th Circuit Court of Appeals nor the U.S. Supreme Court ruled on these other issues, which Dr. Abreu contends is an improper application of the laws based in the U.S. Constitution. Dr. Abreu believes that even more alarming is the possibility that the Justices of the Supreme Court and their respective clerks did not consider this case seriously. Given the importance of this case for the overall welfare of society, Dr. Abreu asks that the U.S. Supreme Court reconsider this case.

Dr. Abreu is a medical doctor from Colombia, a former dermatologist, with a Ph.D. in Immunology from the USA and Colombia and a postdoctoral fellow from France INSERN and from the Medical College of Wisconsin. She came to the United States in October 2001 under H1-B visa with her 12-year old daughter with the promise of a faculty position and to be able to continue her research on a new disease she discovered, a new variant of endemic pemphigus foliaceus in El Bagre-Colombia. She worked with Drs.

Andrew Mellor and David Munn at the Institute of Molecular Medicine and Genetics ("IMMAG").

Before coming to this country, Dr. Abreu was considered a world leader physician and scientist in autoimmune skin diseases and was an associate professor, Director of Bullous Skin Disease Program and Director of International Relationship of the School of Medicine at the University of Antioquia (U de A) in Medellin, Colombia. She was forced to leave Colombia after she demonstrated fraud at the U de A when the President bought second hand equipment with grant money she had earned from several sources, including the Embassy of Japan in Colombia (EJC). Being a person who does not tolerate unethical activity, and notwithstanding the fact that corruption was commonplace in Colombia, Dr. Abreu criticized the leadership at U de A. She and her daughter were threatened, and she took these threats seriously because a few years earlier her uncle, the Interim president of U de A, attorney, anthropologist, theologian and leader in human rights, was assassinated at U de A for exposing unethical activities.

Dr. Abreu came to this country only to be faced with the same type of unethical activities at MCG. Contrary to their original commitment, Dr. Abreu was not offered a faculty position with Drs. Mellor and Munn upon her arrival but a post-doctoral fellow. Being well-trained in reading microscope slides, she realized Drs. Mellor and Munn were publishing misleading results about the presence of one enzyme named indoleamine dioxygenase (IDO) and sentinel

lymph node in patients with skin melanoma. When Dr. Abreu confronted the doctors about this, she became the victim of retaliation and was eventually moved into another position in another department. Interestingly, an "internal investigation" was performed by MCG after Dr. Abreu was terminated and reported this information to MCG officials, and the investigation shows no wrongdoing.

As discussed in her initial Petition, Dr. Abreu made every effort to work with Dr. Marcus and his staff concerning the irregularities she found in Dr. Marcus' clinical trials. They ignored her. Dr. Abreu had no choice but to inform Ms. Mipro, the Department Administrator, of her concerns.

The clinical trials were out of control at MCG for more than a decade as demonstrated to the lower courts through the testimony of former auditor, Ms. Bridgette Taylor. Dr. Abreu felt that she could only come forward with what she found to be serious research misconduct in Dr. Marcus' clinical trials. This resulted in her wrongful termination, and Dr. Abreu seeks justice as outlined below and the opportunity to serve the public through a job which will contribute to the safe conduct of clinical trials and insure the safety of the patients involved in the studies and the public.

IV. CONCLUSION

Dr. Abreu requests that she be compensated for the infringement of her rights and violations of the Whistleblower Act, O.C.G.A. § 45-1-4, by being paid what represents the salaries at a level of an associate or full professor at MCG during the past six years at the approximate annual rate of $110,000 to $140,000; that she be reimbursed her legal costs in the approximate amount of $75,000; that she be reimbursed the cost of the hospitalization of her daughter (after being attacked by someone Dr. Abreu believes was sent by MCG, one of the 13 attacks suffered by her and her daughter, evidence of which was provided to the lower courts) in the amount of $10,000; and that she be paid the cost of immigration for jeopardizing the immigrant status of her and her daughter in the amount of $12,000. This is a total of $697,000. MCG and the BOR should pay the taxes, both federal and state, over these amounts. MCG and the BOR should also pay her retirement and deposit it into her extinguished retirement account. Dr. Abreu withdrew all her savings, sold her house to cover the legal fees and her living expenses for one year during which time MCG used what Dr. Abreu decided was a bogus mediator to recover Dr. Abreu's evidence and documents in her possession. Dr. Abreu also requests damages of $303,000, bringing the total to $1,000,000. Dr. Abreu also requests that she be rehired as an associate professor, tenure-track, with a start-up package (SUP) of $250,000 yearly for three years, not including her salary [A SUP is a process commonly

used when hiring any faculty in research. Most universities in the USA provide this. At MCG the minimal SUP is around $250,000 per year for three years (but some projects have been given as much as $5,000,000 like Drs. Alvin Head and Stephen Meiler in Anesthesiology). The SUP includes laboratory space, student/postdoctoral salaries, laboratory equipment, reagents, test instruments, small tools, glassware, maintenance, core facilities fees, fees for submission of publications, computers, medical and scientific association fees, etc. The SUP is all auditable and is managed directly through MCG and remains inside MCG.] Finally, Dr. Abreu respectfully requests green card sponsors for her and her daughter and at least two years of retroactive vacation.

Respectfully submitted,

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CERTIFICATE REQUIRED BY RULE 44

The undersigned Petitioner, pursuant to Rule 44(2) of the United States Supreme Court Rules, certifies that she has presented in this Petition for Rehearing what she considers to be substantial grounds not previously presented and has restricted her argument to those grounds, that she presents this Petition for Rehearing in good faith and not for delay.

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